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No._____

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT JOHNSON and GERALDINE JOHNSON,
Petitioners,

vs.

CITY OF GLENCOE, GAVIN LAW OFFICE, MICHAEL GAVIN, KERRY OLSON, GARY BALLARD, COUNTY OF McLEOD, GLENCOE-McLEOD JOINT AIRPORT ZONING BOARD, EDWIN HOMAN, RUSSELL BACON and ELFEGE AUSTAD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the "just compensation" clause of the Fifth Amendment to the United States Constitution requires that a State provide a monetary remedy to a property owner whose property has been "taken for public use" where the State law provides for injunctive relief as the sole remedy?

II. Whether the State of Minnesota's barring of petitioners from any monetary remedy and limiting their State Court relief solely to an injunction for a "taking for public use" within the meaning of the Fifth Amendment has denied petitioners a full and fair opportunity to litigate their damage claim in State Court and thereby entitling them to maintain a 42 U.S.C. Sec. 1983 action in Federal District Court?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties in the proceeding in the Court of Appeals (Supreme Court Rule 21.1(b)).

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Robert and Geraldine Johnson, respectfully pray that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Eighth Circuit filed on December 14, 1983.

OPINIONS BELOW

The opinion, dated December 14, 1983, of the Court of Appeals for the Eighth Circuit is reported at 722 F. 2d 432 (1983). The opinion is reprinted in the Appendix hereto beginning on A-1. The Order filed March 17, 1983 of the United States District Court for the District of Minnesota, Third Division is unreported. The Order is reprinted in the Appendix hereto, page A-3.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254. The Judgment of the Court of Appeals was entered on December 14, 1983.

PROVISIONS OF CONSTITUTION AND STATUTES INVOLVED

CONSTITUTION

The Fifth Amendment of the United States Constitution provides in pertinent part "nor shall private property be taken for public use without payment of just compensation."

CIVIL RIGHTS ACTS

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (42 U.S.C. Sec. 1983)

STATEMENT OF THE CASE

Petitioners had their property temporarily taken in violation of the Fifth Amendment to the United States Constitution by the respondents. The State of Minnesota, through its judiciary, has unconstitutionally limited petitioners' State Court remedy to injunctive relief and prohibits petitioners from recovering damages for the injury they have suffered even though the State Court found that respondents acted in violation of the Fifth Amendment.

Petitioners' 42 U.S.C. Sec. 1983 claim is for the damages caused by respondents in temporarily taking their property for public use without ever making any payment of just compensation. The State Court enjoined the enforcement of the offending ordinance but pursuant to State law, limited petitioners' remedy solely to injunctive relief. The Federal District Court of Minnesota and the Court of Appeals for the Eighth Court of Appeals, held that petitioners' claim was barred by the doctrine of res judicata.

The Glencoe Airport Zoning Ordinance applied, what it calls A Zone restriction to 13.5 acres of the 15 acres of petitioners' land which is located at the end of one of the runways of Glencoe Municipal Airport. A Zone restrictions, in essence, placed an avigation easement to the ground on the 13.5 acres of petitioners' property located in A Zone and denied them all reasonable uses of their property. The ordinance gave the respondents the right to cut down petitioners' trees if they so chose.

In October, 1978 petitioners commenced an action in Minnesota District Court against respondents Glencoe-McLeod Joint Airport Zoning Board, (hereinafter JGMAZB) McLeod County and City of Glencoe seeking a Writ of Mandamus to

compel them to initiate condemnation proceedings for the taking which had occurred. Due to the fact that a similar case was pending in the Minnesota Supreme Court, the respondents in the Minnesota action were granted a postponement of the trial until that case, *McShane v. City of Faribault*, 292 N.W.2d 253 (1980) was decided.

On April 4, 1980, the Minnesota Supreme Court decided the *McShane* case. That Court held that A Zone and B Zone restrictions constituted a taking of property for public use in violation of the Fifth Amendment and the Minnesota Constitution. However, the Court held that Mandamus, in the nature of an inverse condemnation, was not the proper remedy. The Court held that the only remedy available to the landowner was to enjoin enforcement of the offending ordinance. In other words, a remedy for the damages suffered by the landowner was denied by Minnesota. The Court recognized that the governmental owner of the Airport may desire that the operation of the ordinance not be enjoined and hence, prior to the injunction taking effect, the government involved was to be given thirty (30) additional days to decide whether to commence Eminent Domain proceedings or not.

On October 6th and 7th, 1980, the Minnesota District Court case was tried to the Court (Honorable John Fitzgerald, Judge of District Court). Respondent Kerry Olson represented the City of Glencoe and the JGMAZB and County of McLeod was represented by the County Attorney. Respondents Ballard and Bacon were deposed in that action. Respondent Austad was Mayor of Glencoe at the time. Respondent Homan was a witness for both McLeod County and Glencoe. Respondent Gavin was a member of Olson's law firm at the time (and at all times herein relevant) and had previously been Glencoe City Attorney.

On December 8, 1980, Judge Fitzgerald issued Findings of Fact, Conclusions of Law and Order for Judgment in petitioners' favor. Judge Fitzgerald found that, *inter alia*, that the Glencoe Airport Zoning ordinance affected 13.5 acres of petitioners' property and that it prohibited on that 13.5 acres the erection or maintenance of any structure whatsoever and any use which would cause an assemblage of persons. From this, he concluded that petitioners' property had suffered a substantial and measurable reduction in the fair market value as a result of the ordinance and that the ordinance constituted a taking of their property without payment of just compensation in violation of the Fifth Amendment of the U.S. Constitution and Article I Section 13 of the Minnesota Constitution.

In accordance with the decision in *McShane* the Order allowed thirty (30) days for the initiation of Eminent Domain proceedings or the enforcement of the ordinance was to be permanently enjoined. The thirty (30) days passed and no Eminent Domain proceedings were initiated. Hence, judgment was entered permanently enjoining the enforcement of the ordinance with respect to petitioners' property.

Petitioners have never been paid just compensation for the unconstitutional taking of their property for public use. The posture of Minnesota State law precludes them from receiving such just compensation because Minnesota limits persons in petitioners' position to injunctive relief. To redress this violation of their federal constitutional rights, petitioners commenced this action in the federal form because the rule announced by the Minnesota Supreme Court in *McShane v. City of Faribault, supra*, denied them a full and fair opportunity to litigate their constitutional claim.

ARGUMENT

I. THIS COURT SHOULD DECIDE THAT THE "JUST COMPENSATION" CLAUSE OF THE FIFTH AMENDMENT REQUIRES THAT A STATE OR ITS POLITICAL SUBDIVISION MUST PROVIDE MONETARY REMEDY FOR PROPERTY OWNERS WHOSE PROPERTY HAS BEEN "TAKEN" FOR PUBLIC USE.

This Court has twice in the last four years granted certiorari in cases which presented the issue of whether a state may constitutionally limit a property owners remedy for a Fifth Amendment "taking" caused by a zoning ordinance to a prospective injunction and deny the property owner any damages for the Fifth Amendment taking which in this context, has been found to have occurred. In *Agins v. City of Tiburon*, 447 U.S. 655 (1980) the Court did not reach this issue because no Fifth Amendment "taking" was found. In *San Diego Gas and Elec. v. City of San Diego*, 450 U.S. 621 (1981) a five member majority of this Court held that there was no final judgment in the California Courts and hence, this Court lacked jurisdiction. Four members of this Court dissented on the ground that the judgment was final and they would have reached the merits. *Id.* at 636. On the merits the dissenters would hold that a State must provide a monetary remedy to a property owner whose property has been taken within the meaning of the Fifth Amendment. *Id.* at 653-654. The monetary remedy must be provided for the temporary taking even if the enforcement of the ordinance statute or regulation is prospectively enjoined. *Id.* at 659-661 Justice Rehnquist, while concurring in the majority opinion stated "if I were satisfied that this appeal was from a final judgment or decree . . . I would have little difficulty in

agreeing with most of what is said in the dissenting opinion of Justice Brennan." *Id.* at 633-634.

This constitutional question is arising at this time because a few state courts are limiting a property owner's remedy to injunctive relief solely. See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P. 2d 25 (1979). The California Supreme Court forthrightly stated its reasons for doing so are to preserve freedom in land use planning and to ease the financial burden on local government.

The Minnesota Supreme Court in *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980) adopted the California rationale as defined in the *Agins v. City of Tiburon, supra* and has limited a property owners remedy in a Fifth Amendment zoning "taking" case solely to injunctive relief. Damages as a remedy are allowed only if there has been permanent physical damage to the property involved even if the owner has been denied all reasonable use of his property for years.

It appears to be the position of the lower courts and the respondents, that because a damage remedy exists in some cases that Minnesota has not denied petitioners their Fifth Amendment right to just compensation. The dissenters in *San Diego* case properly rejected this specious argument. A monetary remedy is constitutionally required for *all* property owners whose property has been "taken" within the meaning of the Fifth Amendment whether the taking is permanent or temporary or whether the property is returned damaged or undamaged.

A State Court can properly fashion a remedy that comports with the constitution. *See Rippley v. City of Lincoln*, 330 N.W.2d 505 (No. Dak. 1983). Minnesota's failure to provide a monetary remedy to petitioners, denies them their Fifth Amendment right to just compensation and gives them a cause of action for violation of their constitutional rights under 42 U.S.C. Sec. 1983.

II. MINNESOTA'S FAILURE TO PROVIDE A DAMAGE REMEDY TO PETITIONERS ENTITLES THEM TO BRING AN ACTION UNDER 42 U.S.C. SEC. 1983 FOR DAMAGES DESPITE THE FACT THAT IN A PRIOR STATE COURT ACTION THE ENFORCEMENT OF THE ORDINANCE WHICH CAUSED A TAKING OF PETITIONERS' PROPERTY WAS ENJOINED.

It is now well settled that a Federal Action under 42 U.S.C. Sec. 1983 will be barred under the doctrine of res judicata (claim preclusion) if in a prior state court adjudication the federal claim could have been raised and litigated but was not. *Migra v. Warren City School District Board of Education* decided January 23, 1984—Court File: 82-728, 52 LW 4151. In that case, the plaintiff did "not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court." *Id.* at 52 LW 4154. This is exactly what petitioners herein are claiming.

Petitioners commenced a mandamus action in the nature of an inverse condemnation in Minnesota District Court. While their action was pending the Minnesota Supreme Court decided the case of *McShane v. City of Faribault, supra.* Petitioners amended their Petition to include a prayer of injunctive relief. The matter was tried to the Court in October, 1980. The Minnesota District Court, as required by the ruling of the Minnesota Supreme Court in *McShane* limited their remedy to injunctive relief. Under the formula required by the *McShane* holding, the very entities that caused the unconstitutional taking were given the opportunity to decide if they would pay petitioners the damages they suffered by instituting eminent domain proceedings or whether they would do nothing and have enforcement of the ordinance permanently enjoined.

By this procedure, Minnesota denied petitioners their damage claim for the taking in violation of the Fifth Amendment which was found to have occurred and prevented them from recovering attorney fees and costs pursuant to Minn. Stat. 117.045. *Id.* at 260.

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court summarized the congressional intent behind providing a federal remedy under 42 U.S.C. Sec. 1983. The Court stated, in that case, a Sec. 1983 remedy is provided

> " . . . . Where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim and where state procedural law, though adequate in theory, was inadequate in practice . . . . In short, the federal courts could step in where state courts were unable or unwilling to protect federal rights." *Id.* at 100-101.

Petitioners submit that whether one views Minnesota's failure to provide a constitutionally required monetary remedy as facially unconstitutional substantive law or a procedure rule that does not allow full and adequate litigation of the constitutional claim, it is clear and obvious that Minnesota State Courts are unwilling to provide to petitioners the constitutional required remedy of monetary relief for an unconstitutional taking for public use.

This Court recognized in *Allen v. McCurry*:

> "This understanding of §1983 might well support an exception to res judicata and collateral estoppel when state law did not provide fair procedures for the litigation of constitutional claims, *or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim.* Such an exception, however, would be essentially the same as the

important general limit on rules of preclusion that already exists: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first Court." (Emphasis Added) *Id.* at 101.

Petitioners submit that this is that case. Minnesota refuses to recognize that petitioners have a constitutionally required remedy for damages for the "taking" which has been found to have occurred. Petitioners therefore are not barred from pursuing their §1983 cause of action in federal district court. See also *Haring v. Prosise*, —— U.S. —— (1983).

CONCLUSION

It is time for this Court to hold that the Fifth Amendment "just compensation" clause requires a monetary (damage) remedy when a Fifth Amendment taking has occurred. Where as here, the State Court refuses to recognize this constitutionally required remedy, the parties are not barred by the doctrine of res judicata from pursuing their remedy under 42 U.S.C. §1983 in Federal Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1478

ROBERT JOHNSON and GERALDINE JOHNSON,
Appellants,

v.

CITY OF GLENCOE, GAVIN LAW OFFICE, GARY BALLARD, KERRY OLSON, MICHAEL GAVIN, COUNTY OF McLEOD, GLENCOE-McLEOD JOINT AIRPORT ZONING BOARD, EDWIN HOMAN, RUSSELL BACON and ELFEGE AUSTAD,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: October 14, 1983
Filed: December 14, 1983

Before ROSS, McMILLIAN and BOWMAN Circuit Judges.

PER CURIAM.

Appellants, Robert and Geraldine Johnson, commenced this action under 42 U.S.C. § 1983 requesting damages for an unconstitutional taking of their property by appellees without payment of just compensation. The district court granted appellees' motion for summary judgment on the basis that under the doctrine of res judicata the prior state court adju-

dication barred this action. The Johnsons appeal from this order.

In 1970, the Johnsons purchased a tract of 15.77 acres of undeveloped land in close proximity to the Glencoe Municipal Airport. The Johnsons had intended to eventually subdivide and sell single family dwellings on this tract of land. In 1978, a zoning ordinance was passed restricting the use of 13.5 of the Johnsons' 15.77 acres. In October of 1978, the Johnsons commenced suit in state court seeking a writ of mandamus to compel eminent domain proceedings on the grounds that the effect of the ordinance as applied to their property constituted a taking without just compensation. In April of 1979, the state court ordered this case removed from its calendar pending the Minnesota Supreme Court's decision in another case which could prove dispositive of the Johnsons' mandamus proceeding. On April 4, 1980, the Minnesota Supreme Court released its decision in *McShane v. City of Faribault*, 292 N.W.2d 258 (Minn. 1980). The court in *McShane* held that mandamus was not the appropriate remedy. However, the court stated that an injunction was appropriate, and, if the injunction would prove inadequate, damages might be appropriate. The Johnsons obtained consent to amend their state court pleadings to seek the injunctive relief referred to in *McShane*.[1] The state court entered an order on December 8, 1980, enjoining the enforcement of the zoning ordinance against the Johnsons' property.

The Johnsons subsequently commenced a section 1983 action in federal district court alleging that they were denied a full and fair opportunity to litigate their damages claim in the prior state court proceeding because Minnesota law limited

[1] Our reading of the *McShane* case does not convince us that the Johnsons were precluded from seeking an award of damages.

their remedy to injunctive relief. The district court ordered that summary judgment be granted because the doctrine of res judicata barred further litigation of this issue.

We have listened to the arguments and reviewed the record and the briefs of the parties. We find the decision of the district court to be free from any error of law. Therefore, pursuant to Rule 14 of the rules of this court, we hold that the order of the district court shall be affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Case No. 3-83-857

Date: 3-17-83

ROBERT JOHNSON, et al.,

Plaintiff,

vs.

CITY OF GLENCOE, et al.,

Defendant.

CLERK'S NOTICE UNDER RULE 77(D)
FEDERAL RULES OF CIVIL PROCEDURE

You are hereby notified that the following was filed this date in the above mentioned action.

ORDER (Devitt-J; 3-16-83) that summary judgment is granted to the defts. on basis that under the doctrine of res judicata this action is barred by prior state court adjudication.
JUDGMENT ENTERED.
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